IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE, CRIMINAL JURISDICTION
CRIMINAL APPEAL NO.132 OF 1990

The State of Maharashtra .. **Appellant**

Versus

(1) Kamlakar Shrawan Thakur
(2) Pandurang Chandrakant Mhatre
(3) Ramesh alias Raman Chandrakant Mhatre
(4) Parshuram Chandrakant Mhatre
(5) Ashok Yadav Mhatre
(6) Damodar Vasant Gharat
(7) Prakash Pandurang Thakur
(8) Ramchandra Ragunath Mhatre
(9) Mahesh Shankar Mhatre
(10) Maininath Sankar Gharat
(11) Mukund Moreshwar Mhatre
(12) Rupendra Shripat Mhatre
(13) Nitin Kamlakar Thakur
(14) Prakash Madhukar Mhatre.. **Respondents**

(Orig. Accd.Nos.1 to 6, 8,10 to 13 and 17 to 19)

Shri P.A. Pol, APP for the State
Shri Sachin Shetye, Advocate for Respondents

CORAM : D.G. DESHPANDE,
& S.R. SATHE, JJ.
DATED : 10th APRIL, 2007

ORAL JUDGEMENT :- (PER S.R. SATHE,J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the 2nd

Additional Sessions Judge, Raigad-Alibag in Sessions Case No.175 of 1988 whereby all the accused (accused Nos.1 to 19) were acquitted of the offences punishable under sections 147, 148, 149, 302 r/w. 149, 307 r/w. 149, 326 r/w. 149 and Section 302, 307, 323, 326 r/w. 34 of IPC.

2. The brief facts giving rise to this appeal are as under :-

All the accused and the prosecution witnesses are the residents of village Phunde, Taluka-Uran, District : Raigad. Deceased Suresh was also resident of the same village. All the accused persons were from 'Shetkari Kamgar Paksha' i.e. Peasants Workers Party (hereafter referred to as PWP) while the deceased and all the injured persons and eye witnesses were belonging to 'Congress(I) Party'. The relations between the accused group and the group of the prosecution witnesses were strained due to party politics. In the year 1988, the prosecution witnesses were office bearers of various committees and they had made several improvements in the village. As a result of the same, the accused persons who were previously in power were jealous of the prosecution witnesses and hence they were searching for the opportunity to degrade the

prosecution witnesses. Several criminal cases were lodged by the abovementioned two groups against each other.

3. On 2nd April, 1988 there was annual festival and fair at Gurabadevi Temple situated near village Phunde. As per the tradition various ornaments were put on the idol of goddess Gurabadevi. The entire temple and its surrounding was illuminated with electric lights. At night villagers had gathered for singing songs and dancing. Practically, all the prosecution witnesses had taken active part in the management of the said festival. The celebrations were carried out on that day till midnight at about 12-30 to 1-00 am and thereafter, most of the villagers left the temple. However, thereafter, the prosecution witnesses and some other persons in all about 15 to 20 had stayed in the temple for the purpose of 'Jagran' and with a view to keep a watch on the ornaments put on the idol. Some of those persons were chit-chatting by sitting in the Sabhamandap while some were playing cards and some were resting. At about 3.00 to 3.15 am, accused No.3 Ramesh Mhatre went to the temple and after just looking at the temple and situation at the said place left the temple without having any talk with anybody. It is the

prosecution case that within 15-20 minutes thereafter, the accused No.3 returned to temple alongwith 15-20 persons. All of them were armed with some weapons like iron bars, swords, pharashi, sticks etc. Finding all the persons chit-chatting and playing cards, the accused persons all of a sudden started attacking the prosecution witnesses in the manner they like. The accused Nos. 2 and 3 gave iron bar blows on the back of Narendrakumar Mhatre. He, however, escaped from the said place and ran to the village. The accused persons were shouting 'धरा-धरा', 'मारा-मारा'. They assaulted Suresh Gharat, Sudhin Mhatre, Namdeo Mhatre, Laxman Mhatre, Gopal Thakur, Mahendra Mhatre and Mahesh Bhoir who were present at the said place. Accused No.12 assaulted Suresh with sword while others assaulted him with sticks and iron bars and he sustained serious injuries. The accused persons had in fact chased Suresh when he was proceeding towards Uran-Panvel Road and then assaulted him in severe manner. After such attack the accused persons ran away from the said place.

4. After receiving one blow on his back the complainant Nandkumar Mhatre rushed towards village and shouted for help by saying that PWP Party Workers assaulted their party members (Congress-I). Naturally,

all the villagers ran towards temple. Nandkumar went to Navasheva Police Station at about 4.15 am. When he reached there, he found Namdeo Yadav Mhatre sitting in the Police Station. After seeing Nandkumar at the said place, PSI Tamaichekar accompanied Nandkumar Mhatre towards the temple. He had also taken with him other two police constables. When they were going to village Phunde in a jeep, on way, they heard some hue and cry and naturally, PSI made query with those persons and he was informed that injured persons have been removed towards hospital. PSI and complainant therefore proceeded towards Uran Hospital. But they were informed that about 6 persons who were seriously injured have been sent to Sion Hospital, Bombay. Then PSI went to the place of offence. When he was proceeding to Navasheva Police Station from that place he saw one ambulance in which there were some injured persons. He also came to know that Suresh Atmaram Gharat is dead. Then complainant Nandkumar Mhatre went to Navasheva Police Station and lodged complaint Exh-31.

5. On the basis of the complaint filed by Nandkumar Mhatre, Police registered crime at C.R. No.17 of 1988 at 6.00 am against the accused for the offences mentioned above. He then went to the hospital and drew

the inquest panchanama and sent the dead body for postmortem. He also prepared the panchanama of place of offence. He attached the clothes of the deceased and recorded statements of several witnesses who had seen the incident. Thereafter, the investigation was taken over by the Asstt. Commissioner of Police. He carried some investigation. But again, on his transfer, the investigation was handed over to other Police Officer. After registration of the offence Police made several attempts to search the accused. However, they were not found in the village. Police also searched them in nearby villages but the accused were not found. They were absconding. However after few days, accused were arrested one after other from time to time. It is the prosecution case that when the accused were in the police custody some of them made statement before police that they would produce weapons and accordingly weapons were discovered and attached as per the provisions of section 27 of the Indian Evidence Act. After receipt of the postmortem report and completion of investigation Police submitted charge-sheet against all the accused persons in the Court of JMFC Uran for the offences mentioned above.

6. Finding that accused were charge-sheeted for

the offences punishable under sections 307 and 302 of IPC which were exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Sessions Court Raigad-Alibag. The learned 2nd Additional Sessions Judge Raigad Alibag framed charge Exh-1 against all the accused for the offences mentioned above. The charge was read over and explained to the accused. All the accused pleaded not guilty and claimed to be tried. From the suggestions put to the prosecution witnesses and the statements of the accused recorded under section 313 of Cr.P.C., it appears that the defence of the accused was of total denial. The accused No.2 took a plea of alibi. All the accused contended that they are falsely implicated, they being members of opposite political party.

7. In order to prove the charge levelled against the accused, the prosecution examined as many as 19 witnesses consisting of PW-1 Sadashiv Patil, Circle Inspector Exh-28, PW-2 Complainant Nandkumar Mhatre Exh-30 injured eye witness, PW-3 Vitthal Mhatre Exh-34, another injured person PW-4 Sudhir Mhatre Exh-36, PW-5 Namdeo Mhatre Exh-37, PW-6 injured eye witness Laxman Mhatre Exh-43, PW-7 injured eye witness Gopal Thakur Exh-44, PW-8 injured eye witness Mahendra Mhatre Exh-

45, PW-9 injured eye witness Vishwanath Mhatre Exh-47, PW-10 injured eye witness Mahesh Bhoir Exh-48, PW-11 Dr. Bhujang Bawa Medical Officer, Uran who examined injured witness and also carried out autopsy Exh-49, PW-12 Police Jamadar Gajanan Sawant Exh-56, PW-13 pancha witness Anil Mhatre Exh-62, PW-14 another pancha witness Madhukar Mhatre Exh-64, PW-15 Pancha witness Krishna Mhatre Exh-65, PW-16 Hasuram Gharat pancha witness Exh-66, PW-17 Asstt. Commissioner of Police Shantaram Waghmare Exh-73, PW-18 Police Inspector Tamaichekar Exh-77 and PW-19 PSI Mahdav Jagtap Exh-85. Prosecution produced complaint Exh-31, medical certificates of the injured persons at Exh-50, 51,52,53, postmortem report Exh-55, panchanama of the place of offence Exh-32, panchanama regarding discovery, inquest panchanama Exh-67, C.A. Report Exh-83. As against this, the accused No.2 examined witness Balkrishna Tambade Exh-94 to prove his defence of alibi and another witness by name Abdul Shaikh, driver of the ambulance at Exh-99.

8. After considering the evidence adduced by the prosecution the learned Trial Judge came to the conclusion that there is no convincing evidence to show that the prosecution witnesses had seen the accused

while assaulting with weapons and the prosecution has failed to prove beyond reasonable doubt that there was an unlawful assembly the common object of which was to commit murder and to do other alleged acts. The learned Trial Judge therefore held that the prosecution has failed to prove the charges levelled against the accused. Naturally, he acquitted all the accused of the offences with which they were charged.

9. Being aggrieved by the said judgement and order, the State of Maharashtra filed this appeal against all the accused. However, from the perusal of the record it appears that this Court (CORAM : S.P. KURDUKAR & M.H. SALDHANA,JJ.) admitted the appeal only against original accused Nos. 1 to 6,8,10 to 13 and 17 to 19 and rejected the leave against accused Nos.7,9,14,15 and 16. During the pendency of this appeal, the original accused No.1 has died and hence appeal against him stands abated.

10. In this appeal before us, the learned APP has urged only 3 points. Firstly, he submitted that the learned Trial Judge has not properly appreciated the evidence on record and has wrongly held that the injured eye witnesses had in fact no sufficient

opportunity to see the assailants. Secondly, he canvassed before us that the learned Trial Judge ought to have taken into consideration the fact that the complaint was lodged practically immediately after the incident and as such merely because the accused and witnesses were of the rival political party, it should not have been held that evidence of eye witnesses is not reliable. Lastly, he submitted that the learned Trial Judge ought to have made an attempt to swift the truth from the falsehood if any. He should not have acquitted all the accused but ought to have convicted at least those accused persons including accused No.12 against whom there was convincing evidence. He, therefore, submitted that the appeal be allowed and the accused be convicted for the offences charged against them.

11. As against this, Shri Sachin Shetye, learned advocate for the original accused Nos.2 to 14 and 17 to 19 supported the judgement and order passed by the learned Trial Judge. He submitted that though it is not disputed that some incident took place at the relevant time, there is no cogent evidence to show that the accused in the instant case assaulted Suresh and other injured persons. He further canvassed before us that

there is discrepancy in the medical evidence and the ocular evidence and as such the accused have been rightly acquitted by the Trial Court. He, therefore, submitted that the appeal be dismissed.

12. It is an admitted fact that the accused and prosecution witnesses are the residents of village Phunde, Taluka : Uran and were known to each other for several years. Accused belong to PWP while the deceased and prosecution witnesses were of Congress (I). It does appear that criminal cases were filed against each other. It is also not in dispute that in the year 1988, the prosecution witnesses and persons from Congress(I) were on several committees. Admittedly, on 2nd April, 1988 there was festival and fair at Gurabadevi temple in the village and for that purpose, the temple was illuminated with electric lights. It is also admitted that on the night of 2nd April, 1988 there was entertainment programme and people had gathered there for singing and dancing and the said programme was over by about 12.30 or 1.00 midnight and thereafter, some villagers including prosecution witnesses were waiting at the temple. It is also not in dispute that on that day at night some incident and commotion took place at the temple and at that time, Suresh died. It is

nobody's case that death of Suresh is accidental or suicidal. The prosecution witnesses have stated that Suresh was assaulted with sword and other weapons and he succumbed to the said injuries. Even Dr. Bhujang Bawa Exh-49 has stated that on 03/04/1988, he carried out the postmortem on the dead body of Suresh and at that time, he noticed the following external injuries as mentioned in column No.17 of the postmortem notes Exh-55.

Column No.17 :-

(1) Incised wound over the left Iliac fossa, verticle skin deep, 8 x ½ cm.

(2) Incised wound over the head 4 cms. above the skull occipital vertical 3 x ½ cm. bone deep.

(3) C.L.W. Over the right upper arm in the middle on lateral side (4 x 4 cms.) with fracture of the right humerus middle third.

(4) C.L.W. just below the right tibial tuberasity 3 x 3 cm. irregular with fracture of tibia and fibula U/3.

(5) C.L.W. over the right shin over lower third on anterior side 2 x 2 cms. with a fracture of tibia and fibula lower third.

(6) Fracture of left radius and ulna lower third.

He has described all injuries are antemortem.

He has also opined that the death was caused due to multiple fracture over the body with haemorragic shock. Thus, from this evidence it is crystal clear that the death of Suresh is homicidal.

13. It is the prosecution case that at the relevant time, the accused persons had formed an unlawful assembly the common object of which was to commit murder of Suresh and make an attempt to commit murder of other prosecution witnesses and to cause grievous injuries to them with deadly weapons. So, it is first necessary to find out whether there was an unlawful assembly ? if so, what was the common object of the same ? and whether all the accused or any one of them or some of them were the members of the said unlawful assembly ?

14. At the outset it must be mentioned that if we see the cross examination of all the prosecution witnesses and even the judgement of the learned Trial Judge we find that it is not even suggested that in the night between 02/04/1988 and 03/04/1988 at about 3.30 am or so no any incident took place at Gurbadevi temple. It is also not suggested that at the relevant time five or more persons had not gathered at the place of offence. So, one thing is certain that there was an assembly of more than five persons at the place of offence. The crucial question is whether the said assembly was an unlawful assembly and whether the

accused were the members of the said unlawful assembly. It must noted that in the instant case, the prosecution has examined as many as nine witnesses and practically, all of them had sustained some injury during the alleged incident. So normally, there is no reason to hold that the injured eye witness would leave aside the real culprits and falsely implicate some other persons in such grave offence merely because they belong to rival political group.

15. It is pertinent to note that the learned Trial Judge has not specifically recorded the finding that the alleged eye witnesses were not at all present at the place of offence. He has however disbelieved them mainly by observing that they must not have been in a position to see the incident as there was dark. However, there is abundant evidence on record to show that as it was a festival day of Gurbadevi temple, the entire temple and its vicinity was illuminated with electric lights. It is also not the case that all those lights were switched off at the relevant time. On the contrary, all the witnesses have categorically stated that as per the usual practice about 20 to 25 persons were waiting in the temple for 'Jagran' and for keeping watch on the idol of goddess as goddess was adorned

with ornaments. The reasoning given by the learned Trial Judge for discarding the testimony of 9 injured eye witnesses is very strange. He has observed :-

> “The clear impression that is created in my mind is that because of the sudden attack by the accused, all the prosecution witnesses ran helter and skelter and everybody tried to run away from the accused to save his life. All the witnesses deposed that they were lying or chit-chating or just resting or playing cards in the temple at the time of the incident. All this shows that the prosecution witnesses must be in a very leisurely mood and were completely tired when the accused suddenly attacked them. This also shows that the prosecution witnesses must not be in a position to see who actually assaulted them. This is a broad picture that is projected by the evidence of all the eye witnesses. In such state of physical and mental tiredness, no witness will be able to tell specifically who actually assaulted him unless he sees from a very short or legible distance the attacking persons.”

16. The above mentioned reasoning of the learned Trial Judge is not at all rational and logical. It is really very difficult to swallow the same and in our considered view, this reasoning and approach of the learned Trial Judge to the evidence was utterly wrong. When he started with such wrong illogical impression he was bound to reach to a wrong conclusion. Had it been the case that all those persons who were in the temple were sleeping and all of a sudden in dark some persons attacked them then it could have been said that the persons who were present were not in a position to give details of the account of what had happened at the said place. But here it is not so.

17. PW-2 Nandkumar Shankar Mhatre (Exh-30), complainant in the instance case has stated that on that day he was waiting in the temple for Jagaran alongwith other persons. At about 3.00 to 3.15 am accused No.3 Ramesh came to the temple, had a look at the said place and then went away and thereafter, he returned within 10-15 minutes alongwith 15 to 20 other villagers. He has also stated that the said persons were from his village and known to him. Similarly, PW-5 Namdev Mhatre Exh-37 has also stated that at the

relevant time, accused No.3 came there alongwith about 20 persons. Prosecution witness No.6 Laxman Mhatre Exh-43, PW-7 Gopal Thakur Exh-44, PW-8 Mahendra Mhatre Exh-45, PW-9 Vishwanath Mhatre Exh-47 and PW-10 Mahesh Bhoir Exh-48 have stated that there were about 5 or more persons at the said place and most of them were having weapons with them and after reaching there they started assaulting the persons who were in the temple. The evidence of these witnesses who are injured eye witnesses is certainly sufficient to prove beyond reasonable doubt that at the relevant time there was an unlawful assembly and the common object of the same was certainly to assault the people with deadly weapons and cause grievous hurt and make murderous attack.

18. The main question is whether the evidence on record is sufficient to prove that the accused were the members of the said unlawful assembly. While considering this question one has to bear in mind that in law it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, section 149 of IPC makes it clear that if an

offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment described by Section 149 is in a sense vicarious and does not always proceed on the basis of that the offence has been actually committed by every member of the unlawful assembly. It has been so held by the Apex Court in **Masalti V/s. State of U.P. AIR 1965 Supreme Court 202**. However, unfortunately, we find that many a times the trial Courts without taking into consideration the above basic principles of section 149 appreciate the evidence and naturally reach to a wrong conclusion.

19. Bearing in mind the admitted facts and circumstances of the case and the above mentioned principles of law, let us scan the evidence on record. Prosecution witness Nandkumar Mhatre Exh-30 is the complainant. He has stated that on that day at about 3 to 3.15 am he had seen initially accused No.3 coming to the said place and thereafter within about 15-20

minutes he came alongwith other 15-20 villagers and they were holding weapons like iron bars, sticks, rods, swords and they started assaulting the people who were sitting in the Sabhamandap of the temple. He has also stated that out of them accused Nos. 2 and 3 were holding iron bars and they assaulted on his back. Somehow he ran and escaped from the said place and went to village. He has further stated that while going he had also seen that accused Nos. 1,2,3,4,12,13 and 18 were present there with weapons. He canditely admitted that he belongs to Congress(I) Party. However, the evidence of this witness is disbelieved by the learned Trial Judge by saying that there is no medical certificate to support his case and when he himself had received some beating and was proceeding towards village from the place of offence how it can be said that he was in a position to identify the other accused persons. In fact, it must be noted that there is sufficient evidence on record in the form of station diary Exh-61 wherefrom it is very clear that this witness had been to Navasheva Police Station which is at a distance of about 2 k.m., at 4.20 am and at that time, he found that other person who was also present in the Sabhamandap had already rushed to the Navasheva Police Station and was giving information about the

same incident to police. It is not the case of Nandkumar that he received a blow heavily or that as a result of the same, he was sustaining any serious injury. So, when entire incident had taken place in such fashion and when others had received very serious injuries and one of them even died as result of the assault made on him we can not jump to the conclusion that the evidence given by this witness is not trustworthy merely because of the fact that there is no medical certificate to show that he had sustained injury. Had it been his case that he was severely beaten and even then he had not gone to the police station or to the doctor, it would have been a different thing but when we find that within few minutes from the incident he had reached to the Police Station and narrated the incident in short to police and requested them to immediately proceed to the place of offence, there was absolutely no reason for the learned Trial Judge to disbelieve the testimony of this witness. His evidence is not at all shaken or shattered in the cross examination. It is pertinent to note that this witness has only stated that accused Nos. 2 and 3 gave him blow and the other accused persons were assaulting other persons. He has not at all given any details about the alleged assault made on other

persons. So, we find that he is a truthful and reliable witness as he had not at all made any exaggeration and had restricted to what he had seen. So, we are inclined to accept his evidence at least to the extent that the alleged incident took place and some of the accused persons were present at the said place with arms and some of them assaulted the persons who were sitting in Sabhamandap.

20. Another eye witness PW-4 Sudhin Mhatre Exh-36 has also narrated similar story and had specifically stated that at the relevant time, when he was sitting in the Sabhamandap somebody gave a blow on his head from back side and he immediately fell down. Thereafter, he went away from the said place and while going he saw accused Nos.3,8,12 and 19. Accused No.12 was having a sword with him while accused No.3 was having iron bar and accused Nos. 8 and 19 were holding sticks. He has identified all these accused persons. Even then, this witness is also disbelieved by the learned Trial Judge. In fact, it must be noted that though he sustained severe blow, he has not at all specifically stated name of any particular accused who gave him blow on his head because he had received that blow from his back side. If really he had any grudge

against the accused and wanted to implicate the accused falsely he could have even named any particular accused. But he has not done so, that itself shows that he is a reliable witness. It must be noted that the prosecution has produced at Exh-89 the medical certificate of this witness from which also it is crystal clear that this witness was admitted in the hospital in the morning of 03/04/1988 and at that time, fracture of skull was noticed. So, from his evidence also it is very clear that at the relevant time, there was an unlawful assembly and the object of the said unlawful assembly was to cause assault with deadly weapons to persons who were in the temple.

21. There is another injured eye witness namely PW-5 Namdev Mhatre Exh-37. He has also stated that when he was in the temple initially accused No.3 had come and then he came alongwith 15-20 persons and those persons started assaulting them who were sitting in the temple and at that time, he saw accused No.1 giving iron blow to Nandkumar and accused No.12 giving blow with sword to Mahendra Mhatre and accused No.10 giving blow to the Gopal Thakur by Pharashi. He has also stated that accused No.2 gave him a blow with iron bar near his waist. He has also stated that he immediately rushed to

the police station and gave information to police about the alleged incident and asked them to go to the place of offence. This version is fully corroborated by the station diary entry No.5 dated 03/04/1988 which is at Exh-57. This entry is made at 4.15 am. His evidence is also corroborated by the prosecution witness No.2 Nandkumar who has stated that when he reached to the Police station, Namdev was present in the police station. Besides this, prosecution has produced at Exh-50 the medical certificate of the said witness which also shows that on 03/04/1988 at 7.00 am he was examined by the Doctor and at that time, he had sustained 3 abrasions and the nature of the injury was simple and the age of the injury was within six hours. So, from his evidence also the presence of accused Nos.1,2,3,10 and 12 at the place of offence with weapons is duly proved and we have no hesitation to accept the testimony of this injured eye witness.

22. Prosecution witness No.7 Gopal Thakur Exh-44 has also stated that at the relevant time, he was present in the temple and after the accused persons entered the temple they started assaulting the persons who were sitting there and accused No.3 gave a blow with iron bar to Nandkumar Mhatre. Accused No.12 gave a

blow with sword on the head of Mahendra. Accused Nos.1,2,3 and 12 also started assaulting Suresh and at that time, accused No.12 was holding sword. He has specifically stated that he saw deceased Suresh being assaulted by the accused on Panvel Road and at that very time, accused Nos.10 and 13 gave a blow with pharashi by its reverse side on his right thigh and he therefore escaped himself from that place and then he was taken to Uran Hospital. The evidence of this witness is however disbelieved by the learned Trial Judge because this witness has not stated that after the accused persons entered the Sabhamandap and started beating he did not make any attempt to run away from the said place. It is true that he has not stated that the moment accused entered, he started running away but that does not mean that he was standing very near from the said place. On the contrary, he has stated that at the relevant time, he was also assaulted. As this witness has clearly stated that there was only swelling as a result of blow received by him on his leg, though he had gone to the Uran Hospital alongwith police, he was sent home. Merely because this witness has stated that even after seeing the accused persons assaulting others, he remained at the spot and went home after the assailants disappeared or merely because he did not

rush to help Suresh who was lying on the ground, it can not be said that the evidence given by this witness is not trustworthy. Merely a witness who had seen such severe attack has not reacted in a particular manner and rushed to help other victims, we can not label him as a got up witness. The evidence of Gopal Thakur also therefore proves the prosecution case with regard to accused Nos.1,2,3,10 and 12.

23. There is another important injured eye witness PW-8 Mahendra Mhatre Exh-45. He has also categorically stated that at the relevant time about 15-20 persons entered in Sabhamandap and accused Nos.1,2,3,11 and 12 were amongst them. He has further stated that there was considerable light in the temple and accused No.2 gave him blow on his head with iron bar while accused No.12 Maininath also gave a blow with sword on his head and when he tried to run away, accused No.2 Pandurang held him and accused Nos. 1 and 3 gave a blow on his back with iron bar. When he ran away by Uran Panvel Road, he noticed that accused No.3 had held Suresh and accused No.12 assaulted him with sword. The evidence of this witness is also not shaken or shattered in the cross-examination. There are some minor omissions but they are not at all significant or they do not indicate that

he is a got up witness. On the contrary, his evidence is also corroborated by medical evidence. The Prosecution has produced his medical certificate at Exh-90 which also shows that he had received injuries and the same were noticed when he was examined by Doctor on 03/04/1988 in the morning. He was admitted in hospital for 2 days. So his evidence is also helpful to the prosecution.

24. The Prosecution witness No.9 Vishwanath Mhatre Exh-47, has stated that at the relevant time he was in Sabhamandap and 15-20 persons came alongwith accused No.3 and at that time, accused No.12 Maininath was having sword with him and he gave blow with that to Mahendra Mhatre. Other people also started assaulting them. He therefore immediately escaped from the said place and crossed the pipeline and then he was hiding himself in the field. However, when he saw towards the temple, he found that accused No.12 Maininath, accused No.2 Pandurang, accused No.3 Ramesh and accused No.11 were assaulting Suresh. He has also stated that when he saw all this, he ran away to his house. The evidence of this witness is disbelieved by the learned Trial Judge mainly on the ground that the story that after seeing the accused assaulting others, he was hiding himself in

the field appears to be unnatural. Secondly, on the ground that his name is not mentioned in the complaint as the person who was present in the Sabhamandap. Firstly, it must be noted that the complainant is not supposed to give the names of all the persons present there particularly when they were about 15 in number. So, merely because his name is not mentioned in the complaint it can not be treated as a ground for discarding his evidence, particularly when we find that the statement of this witness is recorded by the Police on the same day i.e. on 03/04/1988 and when the same is in accordance with other evidence of the prosecution witnesses. There is nothing on record to indicate that this witness had any opportunity to meet other witness prior to the time he deposed before police. So, under such circumstances it can not be said that he is a got up witness and that he had not seen the alleged incident.

25. The Prosecution story is also corroborated by the other injured eye witness namely PW-10 Mahesh Bhoir Exh-48. He has also stated that at the relevant time about 15-20 persons entered in Sabhamandap. He identified accused before Court as the same persons and stated that at that time, accused Nos.1,2 and 3 gave

iron blow to Nandkumar Mhatre and accused Pandurang gave iron blow on his chest. He has also stated that Suresh Gharat was being assaulted by accused No.12,2,1,10,11,13 and 17. It is true that this witness has not given the details of the said assault. He has not stated as to which accused gave a particular blow or by which weapon. But merely because he has not stated accordingly it can not be said that he is not a truthful witness. While appreciating the evidence in this type of case we can not ignore the fact that when the assailants are more in number and they are assaulting several persons, it is really very difficult for any one to give details of the alleged assault. In fact, in such type of cases as it is not possible to give details of assault all that has to be proved is that all those persons were having common object and they were the members of an unlawful assembly. Each and every overt act committed by each member of an unlawful assembly is not at all required to be proved. Incidently, it must be noted that the evidence of injured eye witness Mahesh Bhoir is also corroborated by medical certificate Exh-51 from which it appears that he was also examined by the Doctor on 03/04/1988 at 7.15 am. So, there is no reason to discard the testimony of this witness.

26. Apart from the above mentioned witnesses who were actually present in the Sabhamandap at the relevant time the Prosecution has examined other two important injured eye witnesses who had reached at the place of offence when they heard hue and cry and they were also assaulted by the accused. One of them is PW-3 Vithal Mhatre. He has stated that on the day of incident, he was working as watchmen in Mehta Company which is situated near Gurabadevi Temple. He has categorically stated that when he was sitting on a chair at the gate of the company he heard shout 'धरा-धरा', 'मारा-मारा'. He, therefore went towards that direction and he found that accused No.3 was holding iron bar and when he proceeded in that direction the accused No.3 gave a blow with iron bar on his left leg. At that very time, accused No.12 came there with a sword in his hand and when he was about to give a blow with sword on his head he i.e. said witness held the sword and as a result of the same his right hand thumb was cut. He has also stated that at that time, accused Nos.2 and 3 also gave him blows. As a result of the said attack, he fell down and became unconscious. After some time regaining consciousness, he went to village and he was taken to Uran Hospital. His evidence is fully corroborated by

the medical evidence of Dr. Bawa Exh-49. He has produced the medical certificate Exh-88. From the perusal of the same, it is very clear that this witness had sustained injury and his right thumb was amputed. He was examined by Doctor on 03/04/1988 at 7.30 am. So, we have no hesitation to accept the evidence of Vithal Mhatre who is in fact an independence witness. Similarly, another witness by name Laxman Mhatre Exh-47 who was also working as watchmen on that day in one construction company office which was situated near Gurabadevi temple, has stated that after hearing the shout he went towards the temple and at that time, he saw the accused persons and accused No.12 gave iron bar blow on his head. He has also stated that at that time accused Nos.1,2,3,4 and 12 chased Suresh and all of them took Suresh to Panvel Road by beating him. The evidence of this witness is also corroborated by medical certificate Exh-130.From the perusal of the same it appears that he was examined on 03/04/1988 and at that time, it was noticed that he had sustained 4 injuries and there was also fracture to his rib. He is also an independent witness. There is nothing on record to indicate that the above mentioned two watchmen were having any particular interest in the prosecution witness or deceased Suresh and having grudge or

grievance against the accused. Even then, these two independent eye witnesses have been disbelieved by the trial court. Learned Trial Judge has observed that when they were appointed as watchmen they were not supposed to leave their place and hence they can not be believed. This approach is not at all reasonable. When these two persons were working as watchmen and they heard hue and cry and the shout of someone near from the place where they were posted they were bound to proceed in that direction at least to see as to what has happened. The conduct of these two witness can not be said to be unnatural. The evidence of these two witnesses is also not shaken or shattered in their cross examination and we are inclined to accept their testimony.

27. The learned Trial Judge at various places in his judgement has observed that as the incident occurred at night time it was not possible for the prosecution witnesses to see the alleged assault and identify the accused from the distance of about 30 to 45 feet. Firstly, it must be mentioned that it has come on record that on the date of incident at the relevant time there were electric lights not only on the temple but in the vicinity of the temple. In order to

celebrate the festival that temple and its surrounding was illuminated. Admittedly, it was the day of 'Pournima', means there was full moon. Admittedly, all the accused were known to the prosecution witnesses since long. So, under such circumstances reasoning given by the learned Trial Judge that there was no possibility for the prosecution witness to see the alleged assault and identify the assailant is not at all acceptable. In his judgement, he has observed *"From 30 feet it is not at all possible that for this witness to see how Suresh was assaulted and also whether it were the accused persons who were mentioned by him to have assaulted Suresh".* This finding does not stand to reasons. One can understand that when a person is attacked by several persons at one and the same time and such incident is seen by the prosecution witness from some distance then he may not be in a position to state specifically as to which accused gave a particular blow and on which particular part of the body and if any one is saying about the same with details then one can only say that he is exaggerating. We often find that while giving evidence from a witness box the witnesses feel that they have to account for each and every action of the accused otherwise they would be disbelieved. So, under such circumstances some

times witness make exaggeration but that by itself is not sufficient to discard their testimony entirely. Ultimately, it is for the Court to swift the truth and falsehood.

28. Much is made about the discrepancy in the number of injuries noticed in the inquest panchanama and number of injuries found on the persons of the deceased Suresh. It does appear that number of injuries mentioned in inquest are more while in Postmortem Notes Exh-55, there is reference of six injuries. However it must be noted that all the vital injuries stated by the witnesses and mentioned in the inquest are finding in postmortem notes. Afterall inquest panchanama has been drawn by laymen. He might have even mentioned very minor abrasion but while carrying on the postmortem, Doctor may not have given any importance to that. But that does not mean that there is any doubt about the injuries noticed at the time of post mortem and the opinion given by the Doctor regarding cause of death. It is also tried to be shown that there is difference between the name of the deceased mentioned in the postmortem notes and the inquest panchanama. In postmortem notes (Exh-55), name is mentioned as Suresh Atmaram Mhatre while in the inquest (Exh-67) it is

mentioned as Suresh Atmaram Gharat. However, it is very clear from the material on record that there was absolutely no dispute about the identification of the deceased. It is not at all disputed that Suresh Atmaram was taken to Uran hospital from the place of incident and from there to Sion Hospital but while on way he died in the Ambulance. So there may be some inadvertent error in mentioning the surname of deceased in Postmortem Notes. That by itself creates no doubt about prosecution version. As he died while removing to Sion Hospital the exact timing when he died is not known to any one and it was not on record. But that does not create any doubt about the prosecution version, nor it changes the fate of the case.

29. The learned Trial Judge has given undue importance to the fact that the investigating officer did not record the statement of ambulance driver. According to him, this shows negligence in the investigation. However, it must be noted that it has come on record that when Suresh was being taken from Uran to Sion Hospital in ambulance, on a way he died. It is not at all challenged by the defence that he had not died on way to Hospital. Moreover, the ambulance driver could not have thrown any light on the exact

timing. So under such circumstances, merely because statement of ambulance driver who carried the injured has not been examined by Investigating Officer, the entire investigation can not be looked with suspicion. In fact, it appears that Investigating Officer was cross-examined at length and various suggestions were put to him to show that because of certain complaints against him, he was transferred from time to time. However, the learned Trial Judge himself has observed :

> " Though all these suggestions do not have any bearing on this case the admission by the Police Sub-Inspector that he did not record the statement of ambulance driver who carried the dead body shows the negligence in respect of investigation."

30. Incidently, it must also be noted that though the injured eye witnesses had in fact given evidence only in respect of the incident which they had actually noticed and had not even made any attempt to rope each and every accused, we find that the learned Trial Judge has observed *"the said witnesses have given the version parrotlike regarding the incident only with a view to save their skin when the matter comes to the point of politics".* In fact, as observed above we find that

witness Nos.2,3,4 and 5 have not even stated anything about the alleged assault on Suresh. Each one has only deposed about the injury caused to him or assault made on him and whatever he had seen. That in fact shows that the witnesses are not tutored and they have not deposed out of vengeance. Only because those witnesses have not given answers with regard to some of the questions put to them regarding the village politics or party politics and have not stated who was the president of Peasants and Workers Party at the relevant time or whether PWP was in power in Uran Taluka at the relevant time who was Sabhapati of Uram Taluka Panchayat Samiti or who was Upsabhapati etc., it was totally wrong on the part of the learned Trial Judge to hold that they have given evidence parrotlike. In fact, he himself at one stage has observed:-

> "Though these questions are not exactly connected with the incident but when each witness goes mechanically denying all these questions based on politics it hits on the crux of the matter."

31. We really fail to understand as to when the question was not at all relevant and not connected with the incident then how it can be said that the answer

given to the said question hits on the crux of the matter. Thus, we find that the entire reasoning and approach of the learned Trial Judge is not only unreasonably and incorrect but perverse.

32. The Prosecution has also adduced evidence with regard to recovery of weapons at the instance of some of the accused. For that purpose, they have examined the pancha witnesses who acted as pancha for panchanama drawn as per section 27 of the Indian Evidence Act. However, unfortunately those witnesses have turned hostile. So, there is no cogent evidence to show that particular weapon was produced by the accused. However, it must be noted that when the ocular evidence adduced by the Prosecution is quite cogent, consistent and convincing and the same is also supported by the medical evidence and prompt lodging of the FIR, there is no need to give any importance regarding recovery of weapons.

33. The learned trial Judge has observed that police ought to have treated the first station diary entry given at 4.15 am by Namdeo as FIR but they have treated the information given by Nandkumar at 6 am as FIR and that creates doubt about prosecution version. But it must be noted that at 4.15 the witness had only

informed police that several persons from opposite party are assaulting their party persons at temple and they are armed and as such police should immediately go to that place. So Police did not record the statement in detail. There was nothing wrong in doing so. The detailed complaint is also recorded and registered at 6 am means within 2 ½ hours. There is evidence on record that since the time Nandkumar went to Police Station at 4.20 am he was with police. He had absolutely no time to meet others and discuss with them and hatch a plan to rope accused falsely. Under the circumstances, the observations made by the learned trial Judge and the conclusions drawn by him have no importance and the same are not legal and correct. Even if the entry made in station diary is treated as FIR that absolutely has no adverse effect on prosecution case and it does change the fate of the case.

34. It has come on record that immediately after the recording of FIR police searched for the accused but they were not in village and were absconding. This is also a circumstance which supports the prosecution and negatives the case of defence.

35. The accused No.2 has taken a plea of alibi.

According to him at the relevant time he was at his working place. But the said place was so near from the place of offence that within five minutes one can reach there on scooter and accused attends the work by going on scooter. Even the learned trial Judge has observed “defence evidence amounts to nil” in this case.

36. In view of the above discussion we have no hesitation to hold that the prosecution has proved beyond reasonable doubt that in between the night 02/04/1988 and 03/04/1988 at about 3.00 to 3.30 am there was an unlawful assembly of which accused No.2, 3,4,5,6,10,11 and 12 were the members. It is correct that the evidence on record goes to show that this is not a case where each of the prosecution witnesses i.e. (PW-2 to PW-10) was assaulted by all the abovementined accused persons. So far as PW-2 Nandkumar is concerned the evidence shows that he was assaulted only by accused Nos. 2 and 3 by iron bar while PW-3 Vithal Mhatre was assaulted with iron bar by accused Nos. 2 and 3 and by accused NO.12 by sword. PW-4 Sudhin Mhatre was assaulted by accused Nos. 3 and 12. In fact, he has also deposed about accused No.8 and 19. However, for that there is absolutely no other corroboration so we are not inclined to hold them guilty and give benefit

of doubt to those two accused persons. PW-5 Namdev Mhatre was assaulted by accused Nos. 1 to 3, 10 and 12. PW-6 Laxman Mhatre is assaulted by accused Nos. 1 to 3,4 and 12, PW-7 Gopal Thakur is assaulted by accused Nos. 1,2,3,10 and 12, PW-8 is assaulted by accused Nos.1,2,5,6,10,11 and 12, PW-10 Mahesh Bhoir was assaulted by accused No.2 Pandurang with iron bar. Deceased Suresh Atmaram Gharat was assaulted by accused No.12 by sword and by accused Nos. 1 to 6,10 and 11 by iron bars, sticks. The question arises, when such is the position, what was the common object of the above mentioned assembly and for what offences the accused persons can be held guilty. Firstly, it must be noted that the common object is different from the common intention in that it does not require prior consent and prior meeting of mind before the attack and an unlawful object may develop after people gather there. In the case of common object, there need not be a prior meeting of minds. It is needless to say that common object of the unlawful assembly can be inferred from the nature of assembly, arms used by them and the behavior of the assembly at or before the scene of occurrence. The common object is an inference of fact to be deduced from the facts and circumstances of each case. The commission of overt act is certainly an

evidence of fact that the accused was a member of an unlawful assembly, but the converse is not true. In other words, it can not be contended that if there is no proof of commission of certain overt act by a particular accused he is not a member of the unlawful assembly. Bearing in mind this position of law if we see the facts and circumstances of the present case, we find that the persons who were assaulted were belonging to Congress(I) party while persons who assaulted them namely the above mentioned accused were belonging to other rival party namely PWP. It is pertinent to note that at mid night all the above mentioned accused persons went to the place of offence at one and the same time alongwith deadly weapons like iron bars, sticks, swords and they conjointly attacked the persons who were sitting in the Sabhamandap of the temple. The manner in which they were attacked is deposed by several prosecution witnesses mentioned above. It clearly indicates that the common object of the said unlawful assembly was to cause grievous hurt to the members of the other political group with deadly weapons. So, we have no hesitation to hold that the above mentioned accused namely accused Nos.2 to 6,10,11 and 12 are guilty of the offences punishable under section 148 and section 326 r/w. Section 149 of IPC. It

is worth to note that some of the prosecution witnesses have sustained grievous hurt with deadly weapons.

37. It is true that there is no specific evidence to show that the death of Suresh was caused due to any particular blow. The postmortem report clearly indicates that he had received in all 6 injuries and some were on vital part by sharp instrument. Doctor has opined that death was caused due to multiple fracture over the body with hemorrhagic shock. It has also come on record that accused No.12 was holding sword. There is sufficient evidence to show that at the relevant time accused No.3 held Suresh and then other accused persons namely accused Nos.2 to 6,10,11,and 12 assaulted him. In fact, prior to starting the assault, the accused Nos.1,2,3,4 and 12 had chased Suresh when he was proceeding away from the place of offence and they in fact took Suresh to Panvel Road by beating him. Even after the time Suresh had fallen on the ground, those accused persons assaulted him with deadly weapons. So, this sequence of events, conduct of the above accused and the weapons used by them clearly establish that the said accused were the members of an unlawful assembly common object of which was to make murderous attack on Suresh. It must also be held that

the above mentioned accused persons had also knowledge that such concentrated attack on Suresh with deadly weapons was sufficient to cause his death. It was argued on behalf of the defence that in the instant case when it is not known as to who gave the fatal blow and when only six injuries were noticed in postmortem how nine accused persons can be held liable for the murder of Suresh. Though the argument appears to be attractive the same is certainly not tenable because here the Prosecution has proved that accused persons were members of an unlawful assembly the common object of which was to make murderous attack on Suresh. Section 149 of IPC enunciates a principle of vicarious liability and therefore, every member of the unlawful assembly is guilty of the offence committed by any member of such assembly. It has been so held in **Rajendra V/s. State of Tamil Nadu 2004 AIR SCW 2967**. In that case, it was alleged by the prosecution that in all eight accused persons assaulted deceased Babu. Out of them, three attacked him with knives causing injuries while two gave feast blows. The Sessions Court and the High Court acquitted two other accused. The two accused who were appellants before the Apex court argued that they did not cause any serious injury but merely assaulted the deceased with feast. The Apex

Court held that once their participation in the incident is established and it is proved that they were members of the unlawful assembly in question such argument is not tenable. Mere fact that they were members of the unlawful assembly at the time when the offence was committed, makes them guilty of the offence committed by any member of the unlawful assembly in prosecution of the common object of that assembly. So, the above observation of the Apex Court helps the prosecution to prove the prosecution case that the above mentioned accused are guilty of offence punishable under section 302 of IPC r/w. 149 of IPC.

38. There are in fact various authoritative pronouncements of the Apex Court in which it has been observed that when the charge is under section 302 r/w. 149 of IPC once it is proved that accused was member of the unlawful assembly the common object of which was to do a particular offence then it is not necessary to prove overt act committed by each and every accused in a case **BHAJANSINGH V/S. STATE OF UP AIR 1974 SUPREME COURT 1564**, initially, all the accused had accosted the deceased then one gave blow with sphere, another gave blow with gandesa and third gave blow with lathi. Even then all the five were convicted for the offence

punishable under section 302 r/w. 149 of IPC though their common object originally was only of beating deceased. Similarly, in a case **BHE RAM V/S. STATE OF HARYANA 1980 CRI.L.J.735,** there was no specific evidence showing the overt act committed by each accused and only a general statement was made that all accused assaulted and caused injury to the deceased. In that case also even on such general statement, the conviction of the accused for offence punishable under section 302 r/w. 149 of IPC was upheld by the Apex Court. In a case **RAMKISHOR PATEL V/S. STATE OF MP 1997 CR.L.J. 207**, 13 accused were charged for the offence punishable under section 302 r/w. 149 of IPC. The Trial Court acquitted all of them. The High Court, however, upheld acquittal of two accused and convicted 11 accused persons for the offence punishable under section 302 r/w. 149 of IPC. The Apex Court observed that when there is evidence showing that all accused had gone to place of occurrence armed with weapons and assaulted victims, inference can be drawn that they had formed unlawful assembly before going to the place of occurrence and that they assaulted victim in furtherance of common object. The Courts specifically observed that finding about the role played by each accused individually is not necessary and convicted all

with the help of 149 of IPC. So, having regard to the evidence on record and the above mentioned position of law we are of the considered view that the prosecution has proved that the accused Nos.2 to 6 and 10,11 and 12 were the members of the unlawful assembly the common object of which was to commit murder of Suresh and all of them can be held guilty for the offences punishable under section 302 r/w. 149 of IPC.

39. We find that there is no sufficient evidence against accused Nos. 8,13,17,18 and 19 to prove the charge levelled against them and they have been rightly acquitted by the learned Trial Judge. But so far as other accused persons mentioned above are concerned the finding recorded by the learned Trial Judge is certainly not legal and correct. We are fully conscious of the fact that while considering appeal against the acquittal of the accused, the Appellate Court has to see whether the reasoning and view taken by the Trial Court is a possible view or not and if it is possible view, the Appellate Court shall not interfere with the same. However, in the instant case as pointed out earlier the entire approach of the learned Trial Judge in appreciating the evidence on record was totally wrong. The reasons given by him for discarding the

evidence of injured eye witnesses are not at all correct and are in fact perverse. Hence, in our considered view, this is a fit case where it is necessary to set aside the finding recorded by the learned Trial Judge in respect of acquittal of accused Nos. 2 to 6 and 10,11 and 12. Hence we pass the following order :-

O R D E R

(i) The appeal filed by the State is partly allowed.

(ii) The order of acquittal passed against the accused Nos.8,13,17, 18 and 19 is upheld. The bail bonds of the said accused stand cancelled.

(iii) The order of acquittal passed against the accused Nos.2 to 6, 10, 11 and 12 for the offences punishable under sections 148, 326 r/w. 149 & 302 r/w. 149 of IPC is set aside. They are convicted for the offence punishable under section 148 of IPC and each one of them is sentenced to suffer R.I. for 3 years and to pay fine of Rs. 500/- each in default to suffer R.I. for one month.

(iv) The accused Nos.2 to 6, 10, 11 and 12 are also convicted for the offence punishable under section 326 r/w. 149 of IPC and each one of them is sentenced to

suffer R.I. for 5 years and to pay fine of Rs.500/- each and in default to suffer R.I. for one month.

(v) The accused Nos.2 to 6, 10, 11 and 12 are also convicted for the offence punishable under section 302 r/w. 149 of IPC and each one of them is sentenced to suffer imprisonment for life and to pay fine of Rs. 500/- and in default to suffer R.I. for one month.

(vi) All substantive sentences to run concurrently.

(vii) The accused who are convicted are entitled to get set off for the period of detention undergone by them in connection with this offence as per section 428 of Criminal Procedure Code.

(viii) The accused Nos. 2 to 6, 10, 11 and 12 to surrender within eight weeks from today failing which the Trial Court to take necessary steps to arrest the said accused and send them to jail to undergo the sentence mentioned above.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)